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UNCONSTITUTIONALITY OF THE ANTI-TRUST ACT OF CONGRESS.

(CHAPTER 647, STATUTES OF 1890.)

Brief of de Forest & Willcox for Central R.R. of N.J.

Supreme Court of the United States.

Filed Dec. 21, 1897.

ON APPEAL FROM THE

Circuit Court of Appeals for the Second Circuit.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,
vs.
THE JOINT TRAFFIC ASSOCIATION ET AL.

No. 341.

Brief,

for the Central Railroad Company of New Jersey, Appellee.

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BRIEF,

for the Central Railroad Company of New Jersey, appellee.

On July 2, 1890, an act was passed by the Congress of the United States entitled, "An act to protect trade and commerce "against unlawful restraints and monopolies" (26 Stat., 209, c. 647). The first section provides that "every contract, combination "in the form of trust or otherwise, or conspiracy in restraint of "trade or commerce among the several states or with foreign nations, "is hereby declared to be illegal."

In United States vs. Freight Association, 166 U. S., 290, it was held that this applies "to all contracts in restraint of inter-"state or foreign trade or commerce, without exception or limi-"tation," and is "not confined to those in which the restraint is "unreasonable" (pp. 291, 328). Accordingly, as to the agreement then under consideration, the court held that, though legal when made, it became illegal upon the passage of the act (pp. 291, 342).

The statute, as now construed, is, therefore, an attempt by Congress to limit the individual in making contracts regarding his own affairs by providing that he shall make no such contracts if they be in restraint of trade. It is held that the individual previously possessed the right to make reasonable contracts of that

character, but that this statute enacts that he shall have that right no longer, irrespective of any question regarding the nature or effect of the particular contract in restraint of trade involved—"without exception or limitation." Without any reference to the question whether or not they are prejudicial to the welfare of society, but merely as an arbitrary expression of the will of Congress, the act denounces as unlawful contracts in restraint of trade which were entirely lawful before its passage.

But "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is "that of the Fifth Amendment" (Monongahela Co. vs. United States, 148 U. S., 312, 336). "It is scarcely necessary to say that "the power given to Congress to regulate interstate commerce does "not carry with it any power to destroy or impair those guaranties" (Interstate Commission vs. Brimson, 154 U. S., 447, 479; Gibbons vs. Ogden, 9 Wheaton, 1, 196; Wilkinson vs. Leland, 2 Peters, 627, 657). If, then, this declaration of the will of Congress exceeds those limitations, the mere fact that it purports to be a regulation of commerce, lends it no support.

Manifestly, the statute, as now construed, does exceed the constitutional power of Congress. The right of the individual to make contracts regarding his own affairs is guaranteed by the provisions of the Fifth Amendment that "no person shall be * * "deprived of life, liberty or property, without due process of law "nor shall private property be taken for public use without just "compensation;" that right can be limited only so far as may be requisite for the security or welfare of society—by exercise of the police power. It is settled by authority that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society. Congress, therefore, is without power to prohibit generally all contracts in restraint of trade and the effort to do this invalidates the act.

Brief.

FIRST.

The right of the individual to make contracts regarding his own affairs is guaranteed by the Fifth Amendment; that right can be limited only so far as may be requisite for the security or welfare of society—by exercise of the police power.

As has been said, the Fifth Amendment provides that "no person shall be * * deprived of life, liberty or property, without "due process of law; nor shall private property be taken for public "use without just compensation." These constitutional guaranties secure to all persons freedom in the pursuit of their avocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor.

Liberty of action in the latter respect has been recognized since early times as a right of the individual; for in the leading case of Mitchel vs. Reynolds, decided by the Court of King's Bench in 1711 (1 P. Wms., 181, 188), it is said that the language of Magna Charta *nullus liber homo*, etc., *dissesietur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis*, etc., "have been *always* taken to extend to freedom of trade." In Printing Co. vs. Sampson, L. R., 19 Eq. Cas., 462, the court said (Sir GEORGE JESSEL, M. R.), "if there is one thing which more than "another public policy requires it is that men of full age and com-"petent understanding shall have the utmost liberty of contracting. "* * * Therefore, you have this paramount public policy to "consider—that you are not lightly to interfere with this freedom of "contract" (p. 465). So, too, this court not long since said that it "was justly urged that those rules which say that a given con-"tract is against public policy, should not be arbitrarily extended "so as to interfere with the freedom of contract" (Gibbs vs. Consolidated Gas Company of Baltimore, 130 U. S., 396, 408). In addition, it is clear that limitations upon the use of property, so far as they go, destroy its value. "The value of property results from the use to which it is put, "and varies with the profitableness of that use, present and pros-"pective, actual and anticipated. There is no pecuniary value out-"side of that which results from such use" (Cleveland Co. vs.

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Backus, 154 U. S., 439, 445; Postal Co. vs. Adams, 155 U. S., 697; People *ex rel.* Manhattan Institution vs. Otis, 90 N. Y., 48; Forster vs. Scott, 136 N. Y., 577, 384).

The legislative branch of the government can impose limitations upon these rights of liberty and property only in the legitimate exercise of the police power. Any attempted limitations thereon which exceed the police power are unconstitutional and void. They deprive the individual of his liberty and property without due process of law, and take his property without just compensation.

> In Allgeyer vs. Louisiana, 165 U. S., 578, the court considered a statute of Louisiana providing that any person, firm or corporation who in any manner whatever does an act in that state to effect, for himself or for another, insurance on property then in the state, in any marine insurance company which has not complied in all respects with the laws of the state, shall be subject to a fine. The facts were that the defendant had made an open contract of insurance in the state of New York with an insurance company of that state, where the premiums were paid, and the losses were to be paid. He had, however, in Louisiana, sent notice to the insurance company in New York advising it of the property within the state of Louisiana to be covered by the policy. The court held that the statute was unconstitutional. It said, "it is natural " that the state court should have remarked that there is in " this 'statute an apparent interference with the liberty of " 'defendants in restricting their rights to place insurance on " 'property of their own whenever and in what company they " 'desired.' Such interference is not only apparent, but it is " real, and we do not think that it is justified for the pur- " pose of upholding what the state says is its policy with re- " gard to foreign insurance companies which had not com- " plied with the laws of the state for doing business within " its limits. In this case the company did no business within " the state, and the contracts were not therein made. The " Supreme Court of Louisiana says that the act of writing " within that state the letter of notification was an " act therein done to effect an insurance on property " then in the state, in a marine insurance company " which had not complied with its laws, and such act " was, therefore, prohibited by the statute. As so con- " strued we think the statute is a violation of the Fourteenth " Amendment of the Federal Constitution, in that it deprives " the defendants of their liberty without due process of law. " The statute which forbids such act does not become due " process of law, because it is inconsistent with the pro-

"visions of the Constitution of the Union. The liberty "mentioned in that amendment means not only the right of "the citizen to be free from the mere physical restraint of "his person, as by incarceration, but the term is deemed "to embrace the right of the citizen to be free in the enjoy- "ment of all his faculties; to be free to use them in all law- "ful ways; to live and work where he will; to earn his "livelihood by any lawful calling; to pursue any livelihood "or avocation, and *for that purpose to enter into all contracts "which may be proper, necessary and essential to his carrying "out to a successful conclusion the purposes above mentioned*" (pp. 588, 589).

In re Grice, 79 Fed. Rep., 627, in holding the anti-trust law of Texas to be unconstitutional, the court expressed the same rule in these words: "One of the most sacred "rights of liberty is the right of contract. All of the rights "of contract which are necessary for the carrying on of "ordinary business affairs are protected by the Constitution, "and are not capable of being restrained by legislative "action" (p. 641).

In People vs. Gillson, 109 N. Y., 389, the statute under consideration prohibited the sale or disposal of any article of food, or any offer, or attempt to do so, upon any repre- sentation or inducement that anything else would be delivered as a gift, prize, premium or reward to the purchaser. It was held that this was violative of the constitutional provision securing to every person liberty and property, unless he was deprived thereof by due process of law, and was not valid as a proper exercise of the police power of the state, or as an exercise of the legislative power to enact what shall constitute a crime. The court said, "the following "propositions are firmly established and recognized; a "person living under our constitution has the right to adopt "and follow such lawful industrial pursuit, not injurious to "the community, as he may see fit. The term 'liberty,' as "used in the Constitution, is not dwarfed into mere freedom "from physical restraint of the person of the citizen as by "incarceration, but is deemed to embrace the right of man "to be free in the enjoyment of the faculties with which he "has been endowed by his Creator, subject only to such "restraints as are necessary for the common welfare. "*Liberty, in its broad sense, as understood in this country, "means the right not only of freedom from servitude, "imprisonment or restraint, but the right of one to use his "faculties in all lawful ways, to live and work where he will, "to earn his livelihood in any lawful calling, and to pursue "any lawful trade or avocation*" (pp. 398, 399). After considering the provisions of the statute, the court said

further, " a person engaged as a retailer of coffee might very " well think that he could greatly enlarge the amount of his " trade by doing precisely what was done by the defendant " in this case, and that, while his profits on the same amount " of coffee sold would be smaller than if he gave no present, " yet, by the growth of his trade, his income at the end of " the year would be more than by the old method. This " statute, if valid, steps in to prevent his adopting such a " course to procure trade, and from it to secure an income " and livelihood for himself and family. He is thus " restrained in the free enjoyment of his faculties, which he " ought to have the right and liberty to use in the way of " creating or adopting plans for the increase and growth of " his trade, business or occupation, unless such restraint is " necessary for the common welfare" (pp. 399, 400). "It can- " not be truthfully maintained that this legislation does not " seriously infringe upon the liberty of the owner or dealer in " food products to pursue a lawful calling in a proper " manner, or that it does not, to some extent at least, " deprive a person of his property by curtailing his power of " sale, and *unless this infringement and deprivation are* " *reasonably necessary for the common welfare, or may be said* " *to fairly tend in that direction or to that result, the legis-* " *lation is invalid as plainly violative of the constitutional* " *provision under discussion*" (p. 400).

In Forster vs. Scott, 136 N. Y., 577, the statute provided that no compensation should be allowed, to the owner of land taken for a street, for any building erected or placed thereon after the filing of a map of the street as prescribed by a section of the act. It was held that this imposed a restriction upon the use of the land which amounted to an encumbrance, and so was unconstitutional. The court said, " the validity of a law is to be determined by its purpose and " its reasonable and practical effect and operation, though " enacted under the guise of some general power which the " legislature may lawfully exercise, but which may be and " frequently is used in such a manner as to encroach, by de- " sign or otherwise, upon the positive restraints of the Con- " stitution. What the legislature cannot do directly, it can- " not do indirectly, as the constitution guards as effectually " against insidious approaches as an open and direct attack. " Whenever a law deprives the owner of the beneficial use " and free enjoyment of his property, or imposes " restraints upon such use and enjoyment, that " materially affect its value without legal process " or compensation, it deprives him of his property " within the meaning of the Constitution. *All that is bea-*

"*eficial in property arises from its use and the fruits of that* "*use, and whatever deprives a person of them, deprives him of* "*all that is desirable or valuable in the title and possession.* "*It is not necessary in order to render a statute obnoxious* "*to the restraints of the Constitution, that it must in* "*terms or in effect authorize an actual physical taking of* "*the property or the thing itself, so long as it affects its free* "*use and enjoyment, or the power of disposition at the will* "*of the owner.* Though the police and other powers of "government may sometimes incidentally affect property "rights, according to established usages and recognized "principles familiar to courts, yet even these powers are not "without limitations, as they can be exercised only to pro- "mote the public good, and are always subject to judicial "scrutiny" (p. 584).

Numerous other authorities in support of these principles will be found in the appendix to this brief (pp. 21–29, *infra*).

The Constitution, therefore, guarantees to every person the right to transact such business and to hold such property as he sees fit, and to make such contracts and arrangements as may be incidental thereto. Congress has no general power to prescribe rules dictated merely by its fancy, regarding the manner in which this shall be done. These rights, like all constitutional rights, cannot be affected by a legislative declaration that their exercise shall be deemed illegal.

Even when the business or property sought to be regulated is such as is said to be "affected with a public interest" (Munn vs. Illinois, 94 U. S., 113; People vs. Budd, 117 N. Y., 1; 143 U. S., 517), the extent of the legislative power is to impose merely such limitations upon freedom of the right to make contracts in connection therewith as are required by the welfare of society and are reasonable under all the circumstances of the case. Any action imposing limitations in excess of this, to that extent infringes upon the rights to liberty and property secured by the constitution. Whether limitations attempted by statute are in fact within the legislative power, is not settled by any legislative declaration upon the subject. That is a judicial question which the courts must determine (Railroad Commission Cases, 116 U. S., 307, 331; Chicago Railway Co. vs. Minnesota, 134 U. S., 418; Reagan vs. Trust Co., 154 U. S., 362; St. Louis Co. vs. Gill, 156 U. S., 649; Covington Co. vs. Sandford, 164 U. S., 578, 592), taking "into consideration

" the interests both of the public and of the owner of the property " (Covington Co. vs. Sandford, 164 U. S., 578, 597 ; Interstate Commerce Commission vs. Railway Company, 167 U. S., 479, 499).

In the present case, however, the limitations imposed upon freedom of the right to make contracts do not apply merely to business or property " affected with a public interest." The action of Congress rests upon no such ground. The statute applies without exception to every sort of business or property, even although the same, in the eye of the law, be not devoted to the use of the public in any respect and do not depend in the least upon any grant by the state of privileges or franchises. So, too, corporations and individuals are alike within its scope.

The act can, therefore, be supported if at all only as an exercise of the police power. If it does not possess that character, the denunciation by Congress of such contracts as illegal cannot deprive any person of his liberty and property by destroying his immemorial (*infra*, pp. 9–16) right to make contracts in reasonable restraint of trade. " Where rights of property are admitted to exist, the " legislature cannot say that they shall exist no longer ; nor will it " make any difference, although a process and a tribunal are ap- " pointed to execute the sentence " (Wynehamer vs. People, 13 N. Y., 378, 393. " The power of making bargains for individuals has " not been delegated to any branch of the government " (Taylor vs. Porter, 4 Hill, 140, 143). " The legislature may not, under the guise " of protecting the public interests, arbitrarily interfere with private " business, or impose unusual and unnecessary restrictions upon law- " ful occupations. In other words, its determination as to what is a " proper exercise of its police powers is not final or conclusive, but " is subject to the supervision of the courts " (Lawton vs. Steele, 152 U. S., 133, 137 ; Colon vs. Lisk, 153 N. Y., 188, 196).

" When and how far the police power may be legitimately exer- " cised with regard to these subjects must be left for determination to " each case as it arises " (Allgeyer vs. Louisiana, 165 U. S., 578, 590). The court, therefore, must determine whether the restrictions now sought to be imposed upon the constitutional right of freedom to make contracts come within the police power. It must decide whether the mere fact that a contract or arrangement—whatever its purpose or character—may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society.

Brief.

SECOND.

It is settled by authority that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society.

Questions regarding the extent of the police power usually arise in connection with statutes professing by their terms to have been passed in order to meet some requirement of the public health or welfare. But the present statute makes no profession of the sort. As an expression of the legislative judgment as to the manner in which private affairs shall be conducted, it baldly pronounces illegal a large volume of the contracts and arrangements which have hitherto been legal and usual in the affairs of life and which, in part, have given to liberty and property their substantial value.

Can such an arbitrary destruction of the rights of liberty and property be sustained upon the ground that it is necessary to the security or welfare of society? If not, under the rules already stated, the action attempted is beyond the legislative power.

The decision of this question presents no difficulty, for it is settled by overwhelming authority that the mere fact that a contract or arrangement is in restraint of trade does *not* render it injurious to the public or prejudicial to the welfare or security of society. That circumstance alone is no criterion of the character of the contract or arrangement in that regard. This was ruled as long ago as 1711, in the leading case of Mitchel vs. Reynolds, 1 P. Wms., 181. The same principle has just been stated in United States vs. Freight Association, 166 U. S., 290, where the court said that "contracts in restraint of "trade have been known and spoken of for hundreds of years, "both in England and in this country, and the term includes all "kinds of those contracts which, in fact, restrain or may restrain "trade. Some of such contracts have been held void and unen- "forceable in the courts by reason of their restraint being unreason- "able, while others have been held valid because they were not of "that nature. A contract may be in restraint of trade and still be "valid at common law" (p. 328). At common law "contracts "of private individuals or corporations touching upon restraints in

" trade must be unreasonable in their nature to be held void" (p. 334).

In Oregon Steam Navigation Co. vs. Winsor, 20 Wall. 64, a steamboat company sold a steamer subject to a stipulation that the purchaser would not employ it for ten years from date in any waters of California. The court held that the contract was not void as in restraint of trade. It said, " cases must be judged according to their circumstances " and can only be rightly judged when the reason and grounds " of the rule are carefully considered. There are two principal " grounds on which the doctrine is founded, that a contract " in restraint of trade is void as against public policy. One " is the injury to the public by being deprived of the re- " stricted party's industry; the other is the injury to the " party himself by being precluded from pursuing his occupa- " tion, and thus being prevented from supporting himself and " his family. It is evident that both these evils occur when " the contract is general, not to pursue one's trade at all, or " not to pursue it in the entire realm or country. The coun- " try suffers the loss in both cases; and the party is deprived " of his occupation, or is obliged to expatriate himself in " order to follow it. A contract that is open to such grave " objection is clearly against public policy. But if neither " of these evils ensue, and if the contract is founded on a " valid consideration and a reasonable ground of benefit to " the other party, it is free from objection, and may be " enforced. In accordance with these principles it is well " settled that a stipulation by a vendee of any trade, busi- " ness or establishment, that the vendor shall not exercise " the same trade or business, or erect a similar establish- " ment within a reasonable distance, so as not to interfere " with the value of the trade, business or thing purchased, " is reasonable and valid. In like manner a stipulation by " the vendor of an article to be used in a business or trade " in which he is himself engaged, that it shall not be used " within a reasonable region or distance, so as not to inter- " fere with his said business or trade, is also valid and bind- " ing. The point of difficulty in these cases is to determine " what is a reasonable distance within which the prohibitory " stipulation may lawfully have effect. And it is obvious, at " first glance, that this must depend upon the circumstances " of the particular case, although, from the uncertain " character of the subject, much latitude must be allowed to " the judgment and discretion of the parties. It is clear " that a stipulation that another shall not pursue his trade " or employment at such a distance from the business of

"the person to be protected, as that it could not possibly "affect or injure him, would be unreasonable and absurd. "On the other hand, a stipulation is unobjectionable and "binding which imposes the restraint to only such an extent "of territory as may be necessary for the protection of the "party making the stipulation, provided it does not violate "the two indispensable conditions, that the other party be "not prevented from pursuing his calling, and that the "country be not deprived of the benefit of his exertions" (pp. 68, 69). This case is cited as stating the law correctly in the dissenting opinion in United States vs. E. C. Knight Co., 156 U. S., 1, 24.

In Gibbs vs. Baltimore Gas Co., 130 U. S., 396, the question was again considered, and the court stated the rules as follows (p. 409): "The decision in Mitchel vs. Reynolds, 1 "P. Wms., 181, s. c., Smith's Leading Cases, 407, 7th Eng. "Ed.; 8th Am. Ed., 756, is the foundation of the rule in "relation to the invalidity of contracts in restraint of trade; "but, as it was made under a condition of things and a state "of society different from those which now prevail, the rule "laid down is not regarded as inflexible, and has been con- "siderably modified. Public welfare is first considered, and "if it be not involved, and the restraint upon one party is "not greater than protection to the other party requires, "the contract may be sustained. *The question is, whether,* "*under the particular circumstances of the case and the nature* "*of the particular contract involved in it, the contract is, or is* "*not, unreasonable* (Rousillon v. Rousillon, 14 Ch. D., 351; "Leather Cloth Co. v. Lorsont, L. R., 9 Eq., 345)."

In Fowle vs. Park, 131 U. S., 88, the court held that a contract relating to a patent medicine which communicated its ingredients in confidence, and provided in substance that the parties should enjoy a monopoly of the sale of it, each within a defined region in the United States, and that it should not be sold below a certain rate or price, was not unreasonable or invalid as in restraint of trade. The court repeated the rules above stated.

In Diamond Match Co. vs. Roeber, 106 N. Y., 473, the court considered a contract by which defendant sold his manufactory to a corporation engaged in the manufacture of the same character of goods. Defendant also agreed that he would not engage in any of the states or territories, excepting two, in the manufacture of such goods. The court held that this agreement was valid. It said, "the laws no longer favor "the granting of exclusive privileges, and, to a great extent, "business corporations are practically partnerships, and may "be organized by any persons who desire to unite their

" capital or skill in business, leaving a free field to all others
" who desire for the same or similar purposes to clothe them-
" selves with a corporate character. The tendency of recent
" adjudications is marked in the direction of relaxing the
" rigor of the doctrine that all contracts in general restraint
" of trade are void irrespective of special circumstances.
" *Indeed, it has of late been denied that a hard and fast rule*
" *of that kind has ever been the law of England* (*Ronsillon* vs.
" *Ronsillon, 14 L. R. Ch. Div., 351*). The law has, *for cen-*
" *turies, permitted contracts in partial restraint of trade when*
" *reasonable;* and in Horner vs. Graves, 7 Bingham, 735,
" Chief-Justice TINDAL considered a true test to be 'whether
" ' the restraint is such only as to afford a fair protection to
" ' the interests of the party in favor of whom it is given, and
" ' not so large as to interfere with the interests of the public.'
" When the restraint is general, but at the same time is co-
" extensive only with the interest to be protected, and with
" the benefit meant to be conferred, there seems to be no
" good reason why, as between the parties, the contract is not
" as reasonable as when the interest is partial, and there is a
" corresponding partial restraint. * * *It is clear that*
" *public policy and the interests of society favor the utmost*
" *freedom of contract within the law, and require that business*
" *transactions should not be trammeled by unnecessary restric-*
" *tions*" (pp. 481–483). * * "We are not aware of any
" rule of law which makes the motive of the covenantee the
" test of the validity of such a contract. On the contrary, we
" *suppose a party may legally purchase the trade and business*
" *of another for the very purpose of preventing competition,*
" *and the validity of the contract, if supported by a consid-*
" *eration, will depend upon its reasonableness as between the*
" *parties.* Combinations between producers to limit pro-
" duction and to enhance prices are or may be unlawful, *but*
" *they stand on a different footing*" (p. 483).

In Hodge vs. Sloan, 107 N. Y., 244, the grantor of certain premises was engaged in the sale of building sand. He inserted a covenant in the deed that the premises in question should not be used for similar purposes. The court held that there was nothing in this prejudicial to the public interests. It said, " assuming with the respondent that the covenant is
" in restraint of trade, it is still valid if it imposes no restric-
" tion upon one party which is not beneficial to the other,
" and was induced by a consideration which made it reason-
" able for the parties to enter into it, or, in other words, if it
" was a proper and useful contract, or such as could not be
" disregarded without injury to a fair contractor. This is the
" doctrine of Chappel vs. Brockway, 21 Wend., 157, and Ross

" vs. Sadgbeer, *id.*, 166, derived by a learned court from the " leading case of Mitchel vs. Reynolds, 1 P. Wms., 181, and " an examination of subsequent decisions" (pp. 248, 249). " Many other instances of restraint might be referred " to, and, where it is of such nature as concerns the " mode of occupying or dealing with the property purchased " in the way of business operations or even the omission of " all business or certain kinds of business, or the erection or " non-erection of buildings upon the property, we see no " reason to doubt the validity of an agreement, fair and valid " in other respects, which secures that restraint" (p. 251).

In Leslie vs. Lorillard, 110 N. Y., 519, the plaintiff was a stockholder in a steamship company which had entered into an agreement with the defendant Lorillard and another company controlled by him, that they should discontinue running steamers in opposition to those of the company first aforesaid. In consideration of such agreement the company first aforesaid agreed to pay certain sums of money. This action was brought to restrain payments in accordance with such agreement upon the ground that it was invalid as being in restraint of trade. The court held that the agreement was valid. It said, " when the provisions of agreements in " restraint of competition tend beyond measures for self- " protection and threaten the public good in a distinctly ap- " preciable manner, they should not be sustained. *The ap- " prehension of danger to the public interests, however, should " rest on evident grounds, and courts should refrain from " the exercise of their equitable powers in interfering with " and restraining the conduct of the affairs of individuals or " of corporations unless their conduct, in some tangible form, " threatens the welfare of the public.* * * Under the authority " of (Diamond Match Co. vs. Roeber) it may be said that no " contracts are void as being in general restraint of trade, " where they operate simply to prevent a party from en- " gaging or competing in the same business. * * The " doctrine held by this court in Diamond Match Company vs. " Roeber should control in the case at bar, and *these contracts, " therefore, cannot be considered objectionable on the ground that " they restrained competition.* Whether competition in this " particular business would be a public benefaction or its re- " straint a source of prejudice, we are unable, of course, to " judge. *I do not think that competition is invariably a public " benefaction, for it may be carried on to such a degree as to " become a general evil*" (pp. 533, 534).

In Tode vs. Gross, 127 N. Y., 480, the defendant was the owner of a cheese factory and engaged in manufacturing

several varieties of cheese by a secret process known only to her and her agents. She entered into an agreement with the plaintiffs providing that she should sell them the factory and its belongings and communicate to them the secret of the manufacture; that she and her agents should refrain from communicating said secret to anyone else, and that, after a certain date, they should refrain from making or selling said cheese. The court held that this was valid. It said that, "it imposed no restriction upon either "that was not beneficial to the other by enhancing the price "to the seller or protecting the purchaser. Recent cases "make it very clear that *such an agreement is not opposed to* "*public policy*, even if the restriction was unlimited as to both time and territory" (p. 485).

In Matthews vs. Associated Press, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving or publishing the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The court held that the by-law was reasonable and valid. It said, "the greater "the number belonging to the organization, the larger will "be its income and the greater amount it will be able to "spend for making the collection of news, and the more "efficient and valuable such collection will be. *To suppress* "*competition in such chosen field among themselves* and to thus "enhance the value of the property and the conveniences "arising from the extended use of the means and opportuni- "ties of the association, it would seem most appropriate to "provide that the members of such association should not "take news from any other" (p. 341).

In Lough vs. Outerbridge, 143 N. Y., 271 (reargued and affirmed on previous opinion, 145 N. Y., 601), a steamship company, defendant, was engaged in carrying freight to the West Indies. A casual steamer about once in every six weeks sailed for the same ports. The company, during the week when the casual steamer sailed, offered to carry all freight for those shipping exclusively by its line at a rate greatly reduced below the regular rate, which was itself reasonable. The plaintiff sought by suit in equity to compel the defendant company to carry freight for it at the reduced rate without any agreement upon its part to ship exclusively by the company's steamers. The court held that this arrangement was lawful. It said, "the mere fact "that the transportation business between the two points "in question was in the hands of the defendants did

"not necessarily create a monopoly, if the general rates "maintained were reasonable and just. * * *When "*the service is performed for a reasonable and just hire,* "*the public have no interest in the question whether one or* "*many are engaged in it. The monopoly which the law views* "*with disfavor is the manipulation of a business in which the* "*public are interested in such a way as to enable one or a few* "*to control and regulate it in their own interest, and to the* "*detriment of the public by exacting unreasonable charges.* But "when an individual or a corporation has established a busi- "ness of a special and limited character, such as the defend- "ants in this case had, they have a right to retain it by "the use of all lawful means" (143 N. Y., 282). "On this "branch of the argument the remarks of Lord COLERIDGE, in "the case of the Mogul S. S. Co. vs. McGregor, L. R. (21 Q. "B. Div.) 544, are applicable: 'The defendants are traders "'with enormous sums of money embarked in their advent- "'ure, and naturally and allowably desire to reap a profit "'from their trade. They have a right to push their lawful "'trades by all lawful means. They have a right to endeavor "'by lawful means to keep their trade in their own hands, "'and by the same means to exclude others from its benefits, "'if they can. Amongst lawful means is certainly included "'the inducing by profitable offers customers to deal with "'them rather than with their rivals. It follows that they "'may, if they see fit, endeavor to induce customers to deal "'with them exclusively by giving notice that only to ex- "'clusive customers will they give the advantage of their "'profitable offers'" (143 N. Y., 283).

In Central Shade Roller Co. vs. Cushman, 143 Mass., 353, three manufacturers of a certain kind of curtain fixture, desiring to avoid competition, formed a corporation in which they were the only stockholders, and an agreement was executed by the corporation and the manufacturers, by the terms of which the manufacturers gave the corporation the sole right to sell said fixture for three years, the corporation agreeing to buy at a specified price all that the manufacturers might make, and the manufacturers acting as the selling agents of the corporation and receiving a commission on the goods sold by them. It was held that the agreement was not void as against public policy. The court said, "even if such an "agreement tends to raise the price of the commodity, it is "one which the parties have a right to make. To hold "otherwise would be to impair the right of persons to make "contracts and to put a price on the products of their own in- "dustry" (p. 364). The same thing was held in Gloucester Co. vs. Russia Co., 154 Mass., 92.

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In Mogul Steamship Co. vs. McGregor, App. Cas., 1892, p. 25, owners of ships formed an association to regulate the number of ships, the division of cargoes and the freights to be demanded, including a rebate of five per cent to those who shipped solely by the association's steamers. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavor to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs and reduced freights to a point so low that the plaintiffs were obliged to carry at unremunerative rates. The associated owners also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of five per cent would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. It was held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the execution of the agreement could not be enjoined.

In Nordenfelt vs. Maxim Co., App. Cas., 1894, p. 535, an inventor sold his invention and covenanted that he would not for twenty-five years engage in manufacturing similar goods. It was held that this agreement was not wider than was necessary for the protection of the purchaser, nor injurious to the public, and that it was, therefore, valid and might be enforced by injunction.

To the same effect are Kearney vs. Taylor, 15 How., U. S., 494, 520; Wicker vs. Hoppock, 6 Wall, 94; *In re* Greene, 52 Fed. Rep. 104; Dueber Watch Co. vs. Howard Co., 55 Fed. Rep., 851, 66 Fed. Rep., 637; U. S. Chemical Co. vs. Provident Chemical Co., 64 Fed. Rep., 946; Continental Co. vs. Board, 67 Fed. Rep., 310; *In re* Grice, 79 Fed. Rep., 627; Marsh vs. Russell, 66 N. Y., 288; Marie vs. Garrison, 83 N. Y., 14, 28; Hopkins vs. Ensign, 122 N. Y., 144; National Wall Paper Co. vs. Hobbs, 90 Hun, 288; Phippen vs. Stickney, 3 Metcalf, 384.

There is nothing inconsistent with these rules in cases regarding monopolies, such as Arnot vs. Pittston Co., 68 N. Y., 558; Judd vs. Harrington, 139 N. Y., 105; People vs. Sheldon, 139 N. Y., 251; People vs. Milk Exchange, 145 N. Y., 267; Morris Run Co. vs. Barclay Co., 68 Pa. St., 173; Salt Co. vs. Guthrie, 35 Ohio St., 666; People *ex rel.* Peabody vs. Gas Co., 130 Ill., 268; Richardson vs. Buhl, 77 Mich., 632. Those were instances of combinations to effect an unlawful purpose—the establishment of a monopoly; the combination was the *gravamen* of the matter. But the provisions

of the statute now under discussion establish as the test of illegality, not a *combination* to make any contract or arrangement; not anything which is unlawful otherwise than as these provisions give it that character. The test is the result in restraint of trade of any contract or combination, however remote that result may be from the main object of the contract or combination, and however incidental and subordinate to its main effect.

But it is held by authority that contracts in restraint of trade are entirely distinct from contracts establishing monopolies (United States vs. E. C. Knight Co., 156 U. S., 1, 24, 25; Diamond Match Co. vs. Roeber, 106 N. Y., 483; Lough vs. Outerbridge, 143 N. Y., 282). And this is recognized in the very title of the act now involved, which states as its purpose the protection of trade against unlawful "restraints *and* monopolies." Moreover, the provisions of the first section of the act now under discussion apply by their terms only to contracts and combinations in restraint of trade, while later sections contain the provisions of the act upon the subject of monopolies. Both the authorities and this statute itself, therefore, recognize the distinction between combinations to establish monopolies regarding articles in common use and contracts in restraint of trade.

But the provisions of the statute now under discussion do not prohibit merely combinations for the purpose of establishing monopolies. Irrespective of that purpose or that result, they prohibit all contracts or arrangements whereby trade may be restrained. The element of monopoly may be entirely lacking; but, if a contract or arrangement restrains trade, these provisions declare it illegal—"without exception or limitation" (United States vs. Freight Association, 166 U. S., 290, 328). The two subjects of monopolies and of contracts merely in restraint of trade are clearly quite distinct, and authorities as to monopolies have no bearing upon these statutory provisions which relate wholly to the latter subject.

It is firmly settled, then, that the mere fact that contracts or arrangements restrain trade in some degree, does *not* render them prejudicial to the security or welfare of society.

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Congress, therefore, is without authority to prohibit generally all contracts in restraint of trade and the effort to do this invalidates the act.

This necessarily follows from the principles and authorities already stated. The constitutional guaranties contained in the Fifth Amendment secure to all persons freedom to make contracts and to dispose of their property at will. The only limitation of this right is the police power. That power can be exercised only so far as may be requisite for the security or welfare of society. It is held by controlling authority that the mere fact that a contract or arrangement may restrain trade does *not* render it prejudicial to the security or welfare of society. That fact alone, therefore, does not render the contract or arrangement a legitimate subject for exercise of the police power. Accordingly, the attempt of Congress to prohibit contracts or arrangements because they possess that character, is void because it infringes upon the constitutional guaranties of liberty and property.

As already said, the statute is held to apply "to all contracts "in restraint of interstate or foreign trade or commerce with- "out exception or limitation" (United States vs. Freight Association, 166 U. S., 290, 328). The extent to which this limits the freedom and destroys the property of the individual can scarcely be exaggerated. For it needs no argument to show that contracts and combinations which are most ordinary and indispensable have the effect of restraining trade. As examples may be suggested all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or mer-

chant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; a covenant in a deed restricting the use of real estate. The effect of most business contracts or combinations is to restrain trade in some degree.

The precise purpose of the present statute as now construed (United States vs. Freight Association, 166 U. S., 290) is to deprive the citizen of the rights which these overwhelming authorities hold that he possesses in this regard. But, as already abundantly shown, the legislature cannot affect those rights by a mere general declaration that their exercise shall be illegal. To quote again from Wynehamer vs. People (13 N. Y., 378, 393), "where rights of property are admitted to exist, the legislature can-"not say they shall exist no longer." As was said in a case where a much less extensive destruction of property rights was attempted, "depriving an owner of property of one of its essential at-"tributes, is depriving him of his property within the "constitutional provision, and a legislative declaration that, "upon the publication of notice, a negotiable security shall no "longer be transferable is not due process of law, working a "forfeiture of the right given by the contract" (People *ex rel.* "Manhattan Institution vs. Otis, 90 N. Y., 48, 52). "The legis-"lature is not vested with the power to arbitrarily provide "that any procedure it may choose to declare shall be regarded "as due process of law. If it possessed that power the guar-"antees of the constitution would be rendered unavailing, and "private rights of citizens would be within its absolute control" (Colon vs. Lisk, 153 N. Y., 188, 195, 196). "The legislature may "not, under the guise of protecting the public interests, arbitrarily "interfere with private business or impose unusual and unnecessary "restrictions upon lawful occupations. In other words, its deter-"mination as to what is a proper exercise of its police powers is "not final or conclusive, but is subject to the supervision of the "courts" (Lawton vs. Steele, 152 U. S., 133, 137).

The presence of these unconstitutional provisions invalidates the statute. Irrespective of any question of combination, these provisions denounce as illegal all contracts or arrangements, whether

made by corporations or individuals, in restraint of trade. This is inconsistent with the constitutional guaranties of liberty and property. These provisions express the principal intention of Congress in passing the statute. Indeed, they are practically its only substantive provisions—all else is penalty and procedure. Without them the act could not stand; they are inseparable from the remainder of the act.

Under well-settled rules the presence of these unconstitutional provisions renders the act wholly void (The Trade-Mark Cases, 100 U. S., 82, 98, 99; Spraigue vs. Thompson, 118 U. S., 90, 95; Baldwin vs. Franks, 120 U. S., 678, 685; Leloup vs. Mobile, 127 U. S., 640, 647; Pollock vs. Trust Co., 158 U. S., 601, 637; Wynehamer vs. People, 13 N. Y., 378, 486, 487; Jones vs. Jones, 104 N. Y., 234; Lawton vs. Steele, 119 N. Y., 226, 241; Rathbone vs. Wirth, 150 N. Y., 459, 477, 478, 479).

CONCLUSION.

The act is unconstitutional and the decree should, therefore, be affirmed.

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APPENDIX.

Further authorities regarding the right to freedom in making contracts and the constitutional guaranties thereof (see p. 7, *supra*).

In Shaver vs. Pennsylvania Co., 71 Fed. Rep., 931, a statute of Ohio provided that no corporation should require persons entering into its employment to waive any future claim for damages for personal injuries. It was held that such a statute violated the Fourteenth Amendment, by depriving persons affected by it of their liberty of contract without due process of law.

In Jones vs. Great Southern Hotel Co., 79 Fed. Rep., 477, a mechanics' lien statute attempted to give a sub-contractor a lien without regard to the state of the account between the owner of the building and the principal contractor, and in effect required the owner to pay to the subcontractor in money in order to discharge his lien, although the owner might have contracted with the principal to pay him by the transfer of property. It was held that this interfered with the right of the owner to make his own contracts, and was unconstitutional.

In Commonwealth vs. Perry, 155 Mass., 117, a statute provided that no employer should impose a fine upon any employee engaged at weaving or withhold his wages in whole or in part for imperfections that might arise during the process of weaving. It was held that this was unconstitutional for the reason that it deprived the parties to whom it applied of the property right to employ weavers and make proper contracts with them.

In re Jacobs, 98 N. Y., 98, the statute under consideration was "An Act to improve the public health by prohibiting the manufacture "of cigars and preparation of tobacco in any form in tenement houses "in certain cases." The court held the act to be unconstitutional. It said, "it is plain that this law interferes with the profitable and free "use of his property by the owner or lessee of a tenement house "who is a cigarmaker, and trammels him in the application of his "industry and the disposition of his labor, and thus, in a strictly "legitimate sense, it arbitrarily deprives him of his property and "of some portion of his personal liberty. The constitutional

" guaranty that no person shall be deprived of his property with-
" out due process of law may be violated without the physical
" taking of property for public or private use. Property may be de-
" stroyed, or its value may be annihilated; it is owned and kept for
" some useful purpose and it has no value unless it can be used.
" Its capability for enjoyment and adaptability to some use are
" essential characteristics and attributes without which property
" cannot be conceived, and hence any law which destroys it or its
" value, or takes away any of its essential attributes, deprives the
" owner of his property. The constitutional guaranty would be of
" little worth if the legislature could, without compensation destroy
" property or its value, deprive the owner of its use, deny him
" the right to live in his own house or to work at any lawful trade
" therein" (p. 105). "So, too, one may be deprived of his liberty
" and his constitutional rights thereto violated without the actual
" imprisonment or restraint of his person. Liberty, in its broad
" sense, as understood in this country, means the right, not only of
" freedom from actual servitude, imprisonment or restraint, but the
" right of one to use his faculties in all lawful ways, to live and
" work where he will, to earn his livelihood in any lawful
" calling and to pursue any lawful trade or avo-
" cation. All laws, therefore, which impair or tram-
" mel these rights, which limit one in his choice of a
" trade or profession, or confine him to work or live in a specified
" locality, or exclude him from his own house, or restrain his other-
" wise lawful movements (except as such laws may be passed in the
" exercise by the legislature of the police power, which will be
" noticed later), are infringements upon his fundamental rights of
" liberty, which are under constitutional protection" (pp. 106, 107).
The court considered whether the statute in question could be sus-
tained under the police power. It said, "under the mere guise of
" police regulations, personal rights and private property cannot be
" arbitrarily invaded, and the determination of the legislature is not
" final or conclusive. If it passes an act ostensibly for the public
" health, and thereby destroys or takes away the property of a
" citizen, or interferes with his personal liberty, then it is for the
" courts to scrutinize the act and see whether it really relates to and
" is convenient and appropriate to promote the public health. It
" matters not that the legislature may in the title to the act, or in

"its body, declare that it is intended for the improvement of the "public health. Such a declaration does not conclude the courts, "and they must yet determine the fact declared and enforce the "supreme law" (p. 110). The court then examined the statute in question and concluded that it was not a legitimate exercise of the police power. It said, "such legislation may invade one class of "rights to-day and another to-morrow, and if it can be sanctioned "under the constitution, while far removed in time we will not be "far away in practical statesmanship from those ages when govern-"mental prefects supervised the building of houses, the rearing of "cattle, the sowing of seed and the reaping of grain, and govern-"mental ordinances regulated the movements and labor of artisans, "the rate of wages, the price of food, the diet and clothing of the "people, and a large range of other affairs long since in all civilized "lands regarded as outside of governmental functions. Such gov-"ernmental interferences disturb the normal adjustments of the "social fabric, and usually derange the delicate and complicated "machinery of industry and cause a score of ills while attempting "the removal of one. When a health law is challenged in the "courts as unconstitutional on the ground that it arbitrarily inter-"feres with personal liberty and private property without due "process of law, the courts must be able to see that it has at least "in fact some relation to the public health, that the public health is "the end actually aimed at, and that it is appropriate and adapted "to that end. This we have not been able to see in this law, and "we must, therefore, pronounce it unconstitutional and void. In "reaching this conclusion we have not been unmindful that the "power which courts possess to condemn legislative acts which are "in conflict with the supreme law should be exercised with great "caution and even with reluctance. But as said by Chancellor "KENT (1 Com., 450): 'It is only by the free exercise of this "'power that courts of justice are enabled to repel assaults and to "'protect every part of the government and every member of the "'community from undue and destructive innovations upon their "'charter rights'" (pp. 114, 115).

In People vs. Marx, 99 N. Y., 377, the statute under considera-tion was an act prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure un-adulterated milk or cream. The court held that this was unconsti-

tutional, inasmuch as the prohibition was not limited to unwholesome or simulated substitutes, but the act absolutely prohibited the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome, valuable or cheap it might be, and however openly and fairly the character of the substitute might be avowed and published. The statute was, therefore, contrary to the provisions, both of the Constitution of the State and of the United States, to the effect that no person shall be deprived of life, liberty or property without due process of law. The court said, "no proposition is now more firmly settled than "that it is one of the fundamental rights and privileges of every "American citizen to adopt and follow such lawful industrial pur- "suit, not injurious to the community, as he may see fit. * * "The term 'liberty,' as protected by the Constitution, is not "cramped into a mere freedom from physical restraint of the person "of the citizen, as by incarceration, but is deemed to embrace the "right of man to be free in the enjoyment of the faculties with "which he has been endowed by his Creator, subject only to such "restraints as are necessary for the common welfare" (p. 386). "Measures of this kind are dangerous even to their promoters. If "the argument of the respondent in support of the absolute power "of the legislature to prohibit one branch of industry for the pur- "pose of protecting another with which it competes can be sus- "tained, why could not the oleomargarine manufacturers, should "they obtain sufficient power to influence or control the legislative "councils, prohibit the manufacture or sale of dairy products? "Would arguments, then, be found wanting to demonstrate the in- "validity under the Constitution of such an act? The principle is "the same in both cases. The numbers engaged upon each side of "the controversy cannot influence the question here. Equal rights "to all are what are intended to be secured by the establishment of "constitutional limits to legislative power, and impartial tribunals "to enforce them" (p. 387).

In Colon vs. Lisk, 153 N. Y., 188, the general rules laid down by the above authorities have recently been restated. The court said, equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People vs. Marx, 99 N. Y., 377, 387). "Under the mere guise of acts to protect

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"against fraud, the legislature cannot arbitrarily strike down "private rights, invade personal freedom or confiscate private "property. The police power must be exercised within its appro- "priate sphere and by appropriate methods" (People vs. Arensberg, 103 N. Y., 388, 399). This power "can be exercised only to "promote the public good, and (is) always subject to judicial "scrutiny" (Forster vs. Scott, 136 N. Y., 577, 584). "When the "legislature passes an act which plainly transcends the limits of "the police power of the state it is the duty of the judiciary to pro- "nounce its invalidity and to nullify the legislative attempt to "invade the citizens' rights" (People *ex rel.* Nechamcus vs. Warden, 144 N. Y., 529, 535). That power "must be exercised "subject to the provisions of both the Federal and State Constitu- "tions, and the law passed in the exercise of such power must tend "in a degree that is perceptible and clear towards the preservation "of the lives, the health, the morals or the welfare of the commu- "nity. * * The court must be enabled to see some clear and "real connection between the assumed purpose of the law and the "actual provisions thereof, and it must see that the latter do tend "in some plain and appreciable manner towards the accomplish- "ment of some of the objects for which the legislature may use this "power" (Health Department vs. Rector, 145 N. Y., 32, 39).

In People vs. Warren, 13 Misc., 615 (Superior Court of Buffalo, General Term, 1895), a statute made it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer thereon. The courts held that this was an unlawful interference with the liberty of the individual, as it violated the prohibition contained in both State and Federal Constitutions of depriving any person of life, liberty or property without due process of law.

In Godcharles vs. Wigeman, 113 Pa. St., 431, a statute prohibited the payment of laborers in orders upon stores in which the employers were interested. The court held that this was unconstitutional, as it was "an attempt * * by the legislature to do what, in "this country, cannot be done; that is, prevent persons who are *sui* "*juris* from making their own contracts" (p. 437).

In Waters vs. Wolf, 162 Pa. St., 153, a statute required the written consent of a subcontractor in order to bind him by a stipulation in a contract made between the original contractor and owner that no mechanics' lien should be filed. The court held that this

was unconstitutional because the right to acquire and possess property necessarily includes the right to make reasonable contracts for the improvement of property, and the contract that no mechanics' lien should be filed is not unreasonable as to either contractor or subcontractor.

In Palmer vs. Tingle, 45 Northeastern, 313, Supreme Court of Ohio, December 8, 1896, a mechanics' lien statute attempted to give a lien on property of the owner to sub-contractors, laborers and those who furnished machinery or material to the contractor. It was held that this was unconstitutional because all to whom the contractor became indebted were bound by the terms of the contract between him and the owner. The court said, "the usual and most frequent means of "acquiring property is by contract, and one of the most valuable "and sacred rights is the right to make and enforce contracts. "* * Contracts and compacts have been entered into between "men, tribes and nations during all time from the earliest dawn of "history; and the right and liberty of contract is one of the "inalienable rights of man, fully secured and protected by our "constitution, and it may be restrained only in so far as it is "necessary for the common welfare and the equal protection and "benefit of the people. That such restraint of the right and liberty "of contract is for the common, public welfare, and equal "protection and benefit of the people, must appear, not only to the "general assembly, in the face of popular clamor or the pressure "of the lobby, but also to the courts; and it must be so clear that a "court of justice, in the calm deliberation of its judgment, may be "able to see that such restraint is for the common welfare and "equal protection and benefit of the people" (p. 315).

In Kuhn vs. Common Council, 70 Mich., 534, a statute prohibited a dealer in liquor from becoming surety upon a liquor dealer's bond. This was held to be in violation of the constitutional principle that no person shall be deprived of life, liberty or property without due process of law and also of the Fourteenth Amendment to the Federal Constitution. The court said that "property does not consist merely of the title and possession. It "includes the right to make any legal use of it, and the right to "pledge or mortgage it, or to sell and transfer it. The right to "contract a debt or other personal obligation is included in the "right to liberty; and the right to contract a debt, or to enter

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"into a bond or other writing obligatory, is also a right of prop-"erty" (p. 537).

In Spry Lumber Co. vs. Trust Co., 77 Michigan, 199, a mechanics' lien statute provided that persons who performed labor should have a lien upon the real estate notwithstanding the terms of any contract between the owner and the contractor. It was held that this was unconstitutional.

In Toledo Co. vs. Jacksonville, 67 Ill., 37, an ordinance required a railway company to keep a flagman by day and a lantern by night at a certain street crossing. It did not appear that this crossing was unusually dangerous. The court held that the ordinance was unconstitutional. It said that "it is not within the power of the "general assembly, under the pretense of exercising the police "power of the state, to enact laws not necessary to the preservation "of the health and safety of the community that will be oppressive "and burdensome upon the citizen. If it should prohibit that "which is harmless in itself, or command that to be done which "does not tend to promote the health, safety or welfare of society, "it would be an unauthorized exercise of power, and it would be "the duty of the courts to declare such legislation void" (p. 40).

In Frorer vs. People, 141 Ill., 171, a statute prohibited persons engaged in any mining or manufacturing business from keeping a "truck store" or being interested in or controlling any store for the furnishing of supplies, tools, clothing, provisions or groceries to their employees while so engaged in mining or manufacturing, and imposed a fine for any violation thereof. It was held that this was unconstitutional as an unauthorized limitation of the right to contract; that the police power is limited to enactments having reference to the comfort, safety and welfare of society and under its guise a person cannot be deprived of his constitutional rights. An adult person of sound mind laboring under any legal disability cannot be deprived of the right to make contracts in respect to labor or the acquisition of property under the pretense of giving such person protection.

In Ramsey vs. People, 142 Ill., 380, a statute required the owners and operators of coal mines, when the miner was paid on the basis of the amount of coal mined and delivered by him, to weigh the coal before it was screened and to pay on such weights. It was held that this was unconstitutional, because it was a depri-

vation, without due process of law, of the liberty and property right of making contracts.

In Ritchie vs. People, 155 Ill., 98, a statute prohibited the employment of females in any factory or workshop for more than eight hours a day. It was held that this was unconstitutional, as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time or faculties, and the substitution of the legislative judgment for that of the employer and employee in a matter about which they were competent to agree with each other: that statutes must not conflict with the constitution, and where their ostensible object was to secure the public comfort, welfare or safety, they must appear to be adapted to that end, and cannot invade the rights of persons and property under the guise of a police regulation.

In Harding vs. People, 160 Ill., 459, a statute attempted to provide the manner in which coal should be weighed at the mines, and, in addition, that the miner should be paid only upon the basis of such weights. It was held that this was unconstitutional, because it deprived the miners, and those employing them, of the right to fix upon the weight of coal mined, or the amount due for mining the same, to their mutual satisfaction.

In State vs. Loomis, 115 Missouri, 307, a statute prohibited any person engaging in manufacturing or mining to issue, in payment of the wages of its employees, any order, check, memorandum, token or evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same was negotiable and redeemable at its face value in cash or in goods or supplies, at the option of the holder. It was held that this was unconstitutional, because it deprived the parties affected of their right to contract freely with each other.

In State vs. Julow, 129 Missouri, 163, a statute prohibited any employer from contracting with his employees to withdraw from any labor organization. It was held that this was unconstitutional, because it deprived the parties affected of their right to freely contract. The court said, "we deny the power of the legislature to do "this; to brand as an offense that which the constitution designates "and declares to be a right, and, therefore, an innocent act, and "consequently, we hold that the statute which professes to exert "such a power is nothing more nor less than a 'legislative judg-

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" 'ment,' and an attempt to deprive all who are included within its " its terms of a constitutional right without due process of law " (p. 175).

In Low vs. Rees Printing Co., 41 Nebraska, 127, an act attempted to provide a rate of compensation to be paid for labor in excess of eight hours. It was held that this was unconstitutional, beause thereby the constitutional right of parties to contract with reference to compensation for services was denied.

In re Eight Hour Law, 21 Colo., 29, it was held that a bill prohibiting mining and manufacturing companies to contract with their employees for more than eight hours as a day's labor was in violation of the right of parties to make their own contracts. In House Bill No. 203, 21 Colo., 27, it was held that an act attempting to fix the manner of ascertaining the compensation for mining coal was unconstitutional.

In re Kuback, 85 California, 274, an ordinance made it a misdemeanor for any contractor to employ any person to work more than eight hours a day or to employ Chinese labor where the work was to be performed under any contract with the state. It was held that this was an infringement of the right of such persons to make and enforce their own contracts, and that the ordinance was not a valid exercise of the police power.

In State vs. Goodwill, 33 West Virginia, 179, a statute prohibited persons engaged in mining and manufacturing from issuing for payment of labor any order or paper excepts uch as was specified in the said act. It was held that this was unconstitutional, as it infringed upon the right to make contracts.